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# In the Supreme Court of the United States

OCTOBER TERM, 1982

**No. 82-813**

RENEE DUBOIS, *et al.* *PETITIONERS*

v.

CITY OF COLLEGE PARK, *et al.* *RESPONDENTS*

**On Petition For A Writ Of *Certiorari* To The Court of Appeals Of Maryland**

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether Petitioner's challenge to the constitutionality of College Park's proposed reapportionment plan is non-justiciable for lack of ripeness where the voter registration drive upon which the redistricting is to be based has not yet begun and the resulting registration data is not yet available.

2. Whether College Park's proposed plan to reapportion its councilmanic election districts solely on the basis of voter registration statistics is on its face consistent with the one person-one vote mandate of the Fourteenth Amendment.

3. Whether Petitioner's claim of invidious discrimination is supported by the evidence adduced below.

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**On Petition For A Writ Of *Certiorari* To The Court Of Appeals Of Maryland**

## RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, The City of College Park, Maryland, and Miriam Wolf, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Court of Appeals of Maryland in this case.

## OPINIONS BELOW

The opinion of the Court of Appeals is reported at Md. , 447 A.2d 838 (1982) The opinion of the Circuit Court for Prince George's County, Maryland, not reported, is reproduced in the Appendix hereto.

## JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on July 19, 1982, affirming the judgment of the Circuit Court for Prince George's County of April 29, 1981. A petition for certiorari was filed by Petitioners on October 18, 1982, within 90 days of the judgment of the Court of Appeals.[1] This Court's jurisdiction was invoked under 28 U.S.C. §1257(3) (1976).

## QUESTIONS PRESENTED

1. Whether Petitioner's challenge to the constitutionality of College Park's proposed reapportionment plan is non-justiciable for lack of ripeness where the voter registration drive upon which the redistricting is to be based has not yet begun and the resulting registration data is not yet available.

2. Whether College Park's proposed plan to reapportion its councilmanic election districts solely on the basis of voter registration statistics is on its face consistent with the one person-one vote mandate of the Fourteenth Amendment.

3. Whether Petitioner's claim of invidious discrimination is supported by the evidence adduced below.

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[1]Due to Petitioners' failure to comply with the printing requirements of Supreme Court Rule 39, the Petition was not actually docketed at the time of filing. Petitioners were instructed to resubmit a conforming petition, which they did on or about November 15, 1982, at which time the Petition was docketed. Subsequent thereto, counsel for Respondents contacted Ms. McFarland of the Clerk's Office who advised counsel that the Brief in Opposition would be due thirty (30) days after receipt by counsel of the revised Petition, pursuant to Rule 24. A letter confirming this understanding was sent by Respondents' counsel to the Clerk on November 18, 1982.

## STATEMENT OF FACTS

The Court is respectfully referred to the opinion of the Court of Appeals of Maryland in *DuBois v. City of College Park (II)*, 286 Md. 677, 679–681, 410 A.2d 577 (1980). The facts pertinent to the instant appeal are set forth below.

Following the mandate of the Court of Appeals in *Dubois II*, the City Council of College Park ("Council") undertook to develop an apportionment plan for the City's eight councilmanic districts consistent with the criteria set forth in the lower court's opinion. The result of this effort was the promulgation of two substantive proposals adopted by resolution of the Council and labeled respectively as Plan A and Plan B. The text of the resolution is reproduced in the Appendix. According to the Preamble of the resolution, the City intended to devise a plan which would not only comport with the guidelines articulated in *DuBois II*, but would also permit College Park to deduct from its apportionment base: "Those persons Supreme Court decisions have told us may be excluded as being "ineligibles," that is, non-residents...."

Under Plan B the City proposed to pursue a "rigorous active program" of soliciting potential registered voters. The Plan contemplates that a mailing will be sent to each housing unit in the City advising persons of the program. The City intends to "deputize" a substantial number of registrants who will make use of a questionnaire designed to elicit information to ensure that all persons registering are indeed *bona fide* residents of College Park. Within approximately three months after the completion of registration the City will then apportion its territory into eight equal councilmanic districts based upon the number of registered voters in each district. It is contemplated that the City will be reapportioned every five years in the event there is a variance of five percent or more between the number of registered voters in any district and the mathematical average of the registered voter population for all districts.

To implement Plan B the City may formally have to amend its Charter. Needless to say, none of the procedures contemplated by Plan B have yet been carried out, pending resolution of Petitioner's request for review by this Court on certiorari.

The constitutionality of Plan B was fully argued by counsel at a hearing before the Circuit Court for Prince George's County on

January 14, 1981. No additional testimony was heard at that hearing nor was any evidence admitted other than the text of the resolution authorizing the Council to submit Plans A and B for the Circuit Court's review. By Memorandum, Opinion and Order dated April 29, 1981, the Circuit Court expressly approved reapportionment Plan B, but criticized Plan A as an "obnoxious" invasion of privacy.

Thereafter, both sides appealed to the Court of Special Appeals of Maryland: Petitioners from the approval of Plan B and Respondents from the apparent rejection of Plan A. Prior to a hearing in the Court of Special Appeals, the Court of Appeals sua sponte issued a writ of certiorari.

On certiorari in the Court of Appeals, Respondents stipulated during oral argument that the City would abandon Plan A were the court to uphold the constitutionality of Plan B. *DuBois v. City of College Park (III)*, Md. , 447 A.2d 838, 840 n.2 (1982). On July 19, 1982, the Court of Appeals entered judgment upholding the constitutionality of Plan B. Petitioners thereafter sought review in this Court by way of a petition for certiorari.

At the time of the hearing in the Court of Appeals, as well as at the present time, the City had taken no steps to implement Plan B, electing instead to await the outcome of the full appellate process. During the pendency of the Maryland state court appeals, municipal elections for Mayor and Council were held in the fall of 1981 under the pre-existing apportionment plan, which still remains in effect.

**1. PETITIONERS' CLAIM THAT THE PROPOSED USE OF VOTER REGISTRATION DATA TO REAPPORTION COLLEGE PARK'S COUNCILMANIC DISTRICTS WILL DEVIATE IMPERMISSIBLY FROM A CONSTITUTIONALLY ACCEPTABLE NORM IS NOT JUSTICIABLE FOR LACK OF RIPENESS.**

Petitioners' primary attack on the constitutionality of College Park's Plan B and presumably the decision of the Maryland Court of Appeals upholding the Plan, is that the use of registered voter data such as that contemplated by Plan B, would not "produce substantially the same results as would a proper population base...." [Pet. for Cert. at 14–15.]

In support of their claim of excessive deviation, Petitioners cite statistics compiled by the City of College Park more than seven years ago in 1975 at about the time this litigation was originally commenced. This data, which is reproduced at page 14 of the Petition, shows the disparities that would presumably arise were voter registration data employed to reapportion the City's eight local election districts. The deviations are computed by comparing the 1975 distribution of registered voters among the various districts to the distribution of the total population in each district using 1970 census data.

In mounting their challenge, however, Petitioners have continued to overlook the fact that Plan B has not yet been put into effect. When it is finally implemented (assuming the Petition is denied), the Plan will not permit use of pre-existing voter registration statistics to redraw district lines. Rather, the City will conduct a rigorous and active program designed especially to solicit and enroll *bona fide* residents as registered voters for local elections. Consequently, it is impossible at this juncture to ascertain whether Plan B will produce a distribution of registered voters that will not deviate substantially from a constitutionally valid mean. Petitioner's cries of excessive deviation are, therefore, premature and unripe for adjudication.

The fact that Plan B has yet to be implemented necessarily precludes adjudication of this issue by this Court because of constitutional and prudential constraints on the power of the federal judiciary to entertain and resolve non-justiciable disputes. The practice of this Court has long been to refrain from deciding abstract, hypothetical or contingent questions of constitutional law; nor will the Court decide any constitutional question, except with reference to the particular facts to which it is to be applied. *Golden v. Zwickler*, 394 U.S. 103, 108 (1969); *Longshoremen's Union v. Boyd*, 347 U.S. 222, 224 (1954); *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461 (1945); *Liverpool, N.Y. & P.S.S. Co. v. Commissioner*, 113 U.S. 33, 39 (1885). Before this Court may properly exercise the powers conferred upon it by Article III of the Constitution to adjudicate cases or controversies arising out of the state courts, there must first exist concrete legal issues presented in actual cases involving imminently certain interference with the legal rights asserted by the plaintiffs. Hypotheti-

cal or speculative harm is not enough. *United Public Workers v. Mitchell*, 330 U.S. 75, 89–90 (1947). As Mr. Justice Frankfurter stated in *Longshoremen's Union v. Boyd*, *supra*,

> Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function.

347 U.S. at 224.

To be sure, the distinction between an abstract question and a case or controversy "is not discernible by any precise test." *Babbitt v. Farm Workers*, 442 U.S. 289, 297-298 (1979). Insofar as the constitutional component of the ripeness doctrine is concerned there must be a "live" case or controversy in the sense that the application of an allegedly unconstitutional statute to the plaintiffs is inevitable. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 140–142 (1974); *see Buckley v. Valeo*, 424 U.S. 1, 116–117 (1976); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); L. Tribe, *American Constitutional Law* §3-13 (1978); Varat, *Variable Justiciability and the Duke Power Case*, 58 Tex. L. Rev. 273, 300–303 (1980).

In the case at bar Petitioners cannot possibly claim to have been harmed by any disparities caused by the implementation of Plan B's voter registration-based system of reapportionment, for the simple reason that Plan B has not yet been activated. Any harm caused to Petitioners' rights by Plan B would be purely conjectural at this stage. There is no conceivable way to ascertain, based on the record now before the Court, whether the use of the to-be accumulated voter registration data will result in an improper deviation from a norm derived from a constitutionally benign population standard. It is, therefore, too early to make anything other than an educated guess as to how Plan B will operate. The adjudication of Petitioners' challenge must await a time when the results of Plan B can be assessed in light of established constitutional doctrine. *Babbitt v. Farm Workers*, *supra*, 442 U.S. at 304.

Like all questions of justiciability, the doctrine of ripeness encompasses a prudential consideration of judicial self-restraint as well as a constitutional limitation on the power of federal courts to adjudicate. *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 81 (1978); *Regional Railroad Reorganization Act Cases*, *supra*, 419 U.S. at 138; *see Poe v. Ullman*, 367 U.S. 497, 502–503 (1961). Viewed as a matter of judicial policy, the ripeness doctrine

calls for the exercise of judicial restraint, notwithstanding the existence of Article III jurisdiction, where the case has not evolved to the point where sufficient facts are available to enable the Court to make an intelligent and informed decision on the issues raised. *United Public Workers v. Mitchell, supra; Rescue Army v. Municipal Court*, 331 U.S. 549, 584 (1947). Thus, in *Socialist Labor Party v. Gilligan*, 406 U.S. 583 (1972), this Court held that an equal protection clause challenge to Ohio's requirement that non-major political parties execute a loyalty affidavit as a condition precedent to obtaining a position on the primary or general election ballot was unripe, where the plaintiffs had failed to allege any facts or adduce any evidence that the loyalty oath provision had restricted their access to the ballot. In the Court's opinion "[p]roblems of prematurity and abstractness may well present 'insuperable obstacles' to the exercise" of jurisdiction, even where the plaintiffs may satisfy the technical requirements of standing and even though they may be parties to a case or controversy. *Id.* at 588.

Similary, in the case at hand, Petitioners' have "jumped the gun" by asking this Court to strike down Plan B as unconstitutional before it has even gone into effect. Unless the Court is prepared to rule that the use of voter registration data to draw election district boundaries is *per se* unconstitutional (a result which would necessarily presuppose the overruling of *Burns v. Richardson*, 384 U.S. 73 (1966)), prudence dictates that the final determination of Plan B's constitutional sufficiency await such time as the results of its implementation can be properly evaluated.

Consequently, for reasons of justiciability alone, review by this Court on certiorari would, at this stage of the controversy, be inappropriate.

**2. THE JUDGMENT OF THE COURT OF APPEALS THAT COLLEGE PARK'S VOTER REGISTRATION-BASED REAPPORTIONMENT PLAN IS NOT PER SE UNCONSTITUTIONAL COMPORTS FULLY WITH PRIOR DECISIONS OF THIS COURT AND THE PREVAILING WEIGHT OF AUTHORITY AROUND THE COUNTRY.**

In view of the fact that Plan B has yet to be implemented, the sole issue before the Court of Appeals as well as this Court was and is whether the City's selection of a registered voter basis for reapportioning its eight councilmanic districts is *per se* violative of

the one person-one vote principal implicit in the Equal Protection Clause of the Fourteenth Amendment. Save for its application to student populations, the decision of the Court of Appeals is wholly unremarkable within the context of Fourteenth Amendment jurisprudence. Indeed, the Maryland Court of Appeals did nothing more and nothing less than hold that the use of a registered voter standard to effectuate the reapportionment of a legislative body is not prohibited *per se* by the equal protection guarantee. The identical issue was disposed of in similar fashion some 16 years earlier by this Court in *Burns v. Richardson*, 384 U.S. 73 (1966) with regard to the reapportionment of the Hawaii state legislature.

The constitutional office of the courts in reviewing state and local reapportionment cases under the one person-one vote doctrine of the equal protection clause is to determine whether the legislature has made an "honest and good faith effort to construct districts...as nearly of equal population as is practicable." *Reynolds v. Sims*, 377 U.S. 533, 578 (1964). For purposes of the nondilution principle, total population statistics derived from the federal decennial census are not the exclusive criteria permitted by the Constitution for use as the basis for redistricting. Indeed, as this Court's decisions in *Burns v. Richardson, supra,* and *Mahan v. Howell*, 410 U.S. 315 (1973), illustrate the use of total population census data in certain areas may well do violence to the one person-one vote principle, thereby necessitating resort to alternative data (such as voter registration statistics) to ensure compliance with the Fourteenth Amendment.

This Court specifically addressed the constitutional propriety of a registered voter basis for reapportionment in *Burns v. Richardson, supra*. Mindful of the risks associated with the use of voter registration statistics for redistricting purposes, the Court nevertheless made it clear that voter registration was an appropriate standard where it produces a "distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis." 384 U.S. at 93.

In approving the use of a registered voter standard for Hawaii, this Court emphasized Hawaii's "special population problems" attributable to the presence of unusually large numbers of military personnel and tourists who were concentrated in one of the state's

western legislative districts. Under these unique demographic circumstances, the use of total population data would have precipitated "grossly absurd and disasterous results." *Id.* at 94. Had the federal census figures been used to apportion the state legislature under such conditions, the "permanent residents" living in districts including military bases might have [had] substantially greater voting power than the electors of districts not including such bases." *Id.* at 94 n.24.

The teaching of *Burns* is that in those jurisdictions, like the City of College Park, that have large non-resident or transient populations, the use of census population statistics might itself contravene the Equal Protection Clause with respect to persons residing in districts having few members of the non-resident class. In these situations, the Constitution not only permits, but may indeed command, the use of an alternative population index. The court below went no further than did this Court in *Burns v. Richardson* in holding that College Park's use of a registered voter basis for reapportionment was not absolutely prohibited in view of the special population circumstances prevailing in the municipality.[2]

The holding of the Court of Appeals below is in line with a host of federal and state court decisions handed down in the wake of *Burns v. Richardson*, which have either upheld or signalled approval of reapportionment plans based upon voter registration data rather than total population statistics. *E.g., Reynolds v. Gallion ex rel. Attorney General*, 308 F. Supp. 803, 805 (M.D. Ala. 1969); *Bowden v. Stacey*, 309 F. Supp. 510, 513 (S.D. Ala. 1970); *Kapral v. Jepson*, 271 F. Supp. 74, 85 (D. Conn. 1967); *Burns v. Gill*, 316 F. Supp. 1285 (D. Haw. 1970); *Pate v. El Paso County*, 337 F. Supp. 95 (W.D. Tex.), *aff'd*, 400 U.S. 806 (1970); *Egan v. Hammond*, 502 P.2d 856, 870 (Alas. 1972); *Hartman v. City & County of Denver*, 185 Colo. 565, 440 P.2d 778, 782 (1968); *Moore v. City of Pacific*, 534 S.W. 2d 486, 504 (Mo. App. 1976).

Worthy of special mention in this connection is the decision of Judge (now Circuit Judge) Newman in *Martin v. Venables*, 401 F. Supp. 611 (D. Conn. 1975) which approved the use of a registered

[2]Using the 1970 census statistics, the "on-campus" student population was alone roughly one-third of the City's total population.

voter base for municipal legislative reapportionment in rather dramatic terms.

> As a matter of democratic theory, it may well be argued that each representative ought to represent the same number of people, without regard to whether the people have voted, have registered, or are even eligible to register. Any and every state and community is free to apportion according to that principle. But the Fourteenth Amendment, as construed in *Burns*, plainly does not mandate this political theory. It requires only that no person have the weight of his vote diminished by permitting the votes of others in another district to acquire added weight. When districts include substantially equal members of registered voters, it is difficult to see how the weight of anyone's vote has been diminished in a constitutional sense. Those who fail to register and thereby forego added representation have no valid complaint against the apportionment; they have the opportunity to register, at least where...there has been no claim of racial discrimination or other improper factor inhibiting registration.

*Id.* at 616–617.

With few exceptions, those post-*Burns* decisions which have explicitly disapproved the use of voter registration data typically involved jurisdictions having a history of racial discrimination which produced voter registration disparities that would have amplified apportionment disparities had a registered voter standard of redistricting been utilized. *E.g., Marshall v. Edwards*, 582 F.2d 927, 937 (5th Cir. 1978), *cert. denied sub nom. East Carroll Parish Police Jury v. Marshall*, 442 U.S. 909 (1979); *Wyche v. Madison Parish Policy Jury*, 635 F.2d 1151, 1162 (5th Cir. 1981); *Cohen v. Maloney*, 410 F. Supp. 1147, 1152 n.9 (D. Del. 1976); *Broadhead v. Ezell*, 348 F. Supp. 1244, 1251–1252 (E.D. Ala. 1972).[3]

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[3]A minority of courts have read *Burns* so restrictively as to foreclose the use of voter registration under most circumstances. *E.g., Preisler v. Mayor of City of St. Louis*, 303 F. Supp. 1071, 1074 (E.D. Mo. 1969); *In re Opinion of the Justices*, 353 Mass. 790, 230 N.E. 2d 801 (1967); *In re Township of Penn Hills*, 216 Pa. Super. 327, 264 A.2nd 429, 431 (1970); *see Calderon V. City of Los Angeles*, 4 Cal. 3d 351, 93 Cal. Rptr. 361, 481 P.2d 481 (1971) (en banc).

As the foregoing discussion has shown, *Burns v. Richardson* and the overwhelming majority of the lower court cases interpreting it unquestionably permit the use of voter registration data as the basis for reapportionment of municipal legislatures. The Court of Appeals of Maryland in upholding the facial validity of College Park's proposed voter registration based reapportionment went no further than did either this Court in *Burns* or those lower courts that have ruled favorably on the issue. The decision of the court below therefore comports completely with the precedents of this tribunal and with the prevailing weight of authority around the country.

As a result, the issuance of a writ of certiorari is unnecessary to resolve a conflict of decisions among the state or federal courts on any point of constitutional jurisprudence. *See Lego v. Twomey*, 404 U.S. 477, 479 n.1 (1972); *Andresen v. Maryland*, 427 U.S. 463, 470 n.5 (1976); *MacGregor v. Westinghouse Company*, 329 U.S. 402 (1947). Moreover, since the ruling of the Maryland Court of Appeals is fully consistent with the holding in *Burns*, certiorari is not called for to correct a direct conflict in decisions of the Maryland courts and those of this Court. *See Hankerson v. North Carolina*, 432 U.S. 233, 240 (1977); *Pittsburgh v. Alco Packing Corp.*, 417 U.S. 369, 371-372 (1974).

### 3. THE DECISION BELOW RAISES NO NOVEL OR SIGNIFICANT ISSUES OF EQUAL APPORTIONMENT LAW OR CONSTITUTIONAL DOCTRINE

The issue addressed by the Court below, while important to the litigants at bar, does not touch upon matters of national concern or overriding national importance. As was noted above, the constitutionality *vel non* of voter registration-based reapportionment has been addressed by this Court on at least one prior occasion. *Burns v. Richardson, supra.* The present litigation is of interest only to the extent that it applies these same principles to nonresident student population in college towns. Thus, but for the demographic complexion of this case, it is virtually indistinguishable on a constitutional plane from *Burns*. Therefore, unless this Court feels compelled to modify or retreat from its holding in *Burns*, there is simply no reason to grant certiorari in the instant case. *See Kosydar v. National Cash Register Co.*, 417 U.S. 62, 65 (1974).

**4.THE PETITIONERS' CLAIM THAT PLAN B WAS TAINTED BY A PATTERN OF INVIDIOUS DISCRIMINATION AGAINST COLLEGE PARK'S STUDENT POPULATION RAISES A PURELY FACTUAL QUESTION WHICH IS NEITHER SUPPORTED BY THE RECORD NOR WORTHY OF REVIEW ON CERTIORARI.**

Petitioners advance the alternative argument that Plan B is invalid for the reason that it is "designed to or operates to minimize or cancel out the voting strenth" of a political element of the population, namely, the University of Maryland student body. [Pet. for Cert. at 15.] In support of this contention, Petitioners make much of the minutes of a City Council meeting held in 1967, eight years before the present litigation was commenced. In addition, Petitioners call attention to the fact that the City has developed several reapportionment plans, all designed to exclude all or part of the non-resident student population. This pattern of activity, say Petitioners, evidences a discriminatory intent on the part of College Park that serves to taint the validity of Plan B, even though the latter proposal, as Petitioners unabashedly concede, is "neither designed nor intended to operate to dilute the voting power of non-campus students..." [Pet. for Cert. at 15][4]

The short answer to this assertion is that Petitioners have conceded the very issue they seek to raise here. As they had to acknowledge below, Plan B was not enacted with any intention of "fencing out" students *qua* students or any other "political element" of the voting population. Throughout the history of this litigation, College Park has sought to devise a constitutionally sound method of protecting *bona fide* residents against the dilution of their vote by a huge block of admittedly *non-resident* students and others who have absolutely no connection with a municipality other than the fact they attend school there for part of the year.

The "fencing out" which Petitioners so vociferously decry is nothing more than an attempt by a local government to distribute political power equitably and fairly among those elements of the

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[4]*See City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980) (holding that proof of discriminatory intent, but not effect, may render an otherwise benign at-large municipal election system invalid for violation of one person-one vote rule.)

population who actually comprise the political community. Seen in this light, College Park has acted no differently than did Hawaii in *Burns* in regard to the unusually large non-resident military and tourist population in that state.

Moreover, considering the relatively small size of the resident population vis-a-vis the non-resident student contingent, the ability to exclude true non-residents from the population base (as determined from the voter registration rolls) is fundamental to the preservation of the political identity of the community. In other words, were College Park obligated to include all non-resident students in its apportionment base, it may very well result in the *de facto* destruction of the subdivision as a distinct political entity. As this Court has itself recognized, "[a]n appropriately defined and uniformly applied requirement of bona fide residence may be necessary to preserve the basic conception of a political community and therefore could withstand close constitutional scrutiny." *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972); *see Pope v. Williams*, 193 U.S. 621 (1904).

The Fourteenth Amendment, as construed by this Court, plainly permits state and local governments to exclude non-residents from the apportionment base. *Burns v. Richardson, supra*, 384 U.S. at 92. Moreover, as this Court has stated, insofar as local government reapportionment is concerned, the Constitution does not require a "uniform strait jacket, binding citizens in devising mechanisms of local government suitable for local needs and efficient in solving legal problems." *Avery v. Midland County*, 390 U.S. 474, 485 (1968). *See generally*, Dodge and McCauley, *Reappointment: A Survey of the Practicality of Voting Equality*, 43 U. Pitt. L. Rev. 527, 565-567 (1982). That a local legislature may have failed accurately to forecast the jurisprudential evolution of the one person-one vote principle in sculpting its past reapportionment proposals, so as to ensure that councilmanic district contain roughly equal numbers of *bona fide residents* cannot and should not be misread as invidious discrimination.

Not only have the Petitioners conceded the issue of invidious discrimination by admitting that no such animus prompted the adoption of Plan B, but the record below simply does not lend support to Petitioners' contention. Thus, even if the City had intended to discriminate against the students *qua* students (which,

of course, it did not), Petitioners have failed to muster any probative evidence to demonstrate such an intent. Given the purely factual character of this argument, review by this Court on certiorari is hardly appropriate.

## CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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# In the Circuit Court for Prince George's County, Maryland

LAW NO. 61,664

RENEE DUBOIS, *et al*, *PLAINTIFFS*

*v.*

CITY OF COLLEGE PARK, *et al*, *DEFENDANTS*

## MEMORANDUM OPINION AND ORDER

Once again this Court is called upon to pass judgment over the constitutionality of the proposed reapportionment of the City of College Park. The previous plan submitted by the City, in accordance with this Court's Memorandum Opinion and Order of November 15, 1977, provided for the reapportionment base to be determined by counting only registered voters from those districts heavily populated by students, and counting the remainder of the population by federal census data. The Court of Appeals, per Judge Eldridge, held this scheme unconstitutional as being violative of the Equal Protection Clause of the Fourteenth Amendment, and Article 24 of the Maryland Declaration of Rights in *DuBois v. City of College Park*, 286 Md. 677, 410 A.2d 577 (1980). More specifically, the Court ruled that by using different standards to count students in different districts, the City was impermissibly creating a classification for which it could not provide sufficient justification.

Enlightened by the wisdom in Judge Eldridge's opinion, the City of College Park proposed two alternative methods of determining an apportionment base when this matter was heard on January 14, 1981. Both plans provide for uniform application, presumably overcoming the difficulties expressed by the Court of Appeals with the previous plan.

Plan A, as submitted by the City, calls for the apportionment base to be determined on the basis of a census, conducted by mail, which would seek to determine the true domicilliaries of College Park. The census would be in the form of a questionnaire, mailed to all addresses in the city. Failure to respond to the questionnaire,

or an incorrect response, would result in penalties up to five hundred dollars or possible imprisonment.

The alternative method proposed by the City, named Plan B, is merely to determine the apportionment base from a list of registered voters, after an "intense" voter registration drive. The City would then reapportion into mathematically equal districts based on the number of registered voters.

The City contends that either plan would effectuate the City's legitimate interest in screening out transients and non-residents without discriminating against any group or political entity. The City further argues that neither plan is intended to discriminate against any group or political entity. The City further argues that neither plan is intended to discriminate against or exclude students who consider themselves residents of College Park.

The Plaintiffs, present or perhaps former on-campus resident students at the University of Maryland, argue that both plans violate the spirit as well as the letter of Judge Eldridge's opinion in that both are designed to exclude resident students from being represented in city government. The Plaintiffs contend that the questions asked in the census proposed in Plan A are unduly intrusive, and that the voter registration base that is Plan B is violative of the Equal Protection clause of the Fourteenth Amendment. The Plaintiffs contend that the only constitutionally permissible method of reapportionment would be to use federal census data as the only base. It is within the context of these arguments that the Court must resolve the issues before it.

The Court must begin its discussion of these two plans by noting that apportionment is essentially a legislative and political process, and should not be subject to judicial interference. *Burns v. Richardson*, 384 U.S. 73, 16 L. Ed. 2d 376, 86 S.Ct. 1286 (1966).

However, with respect to Plan A, this Court finds itself in agreement with Plaintiffs. The questions appearing on the census form are both intrusive and obnoxious. It is probable that a great many residents of College Park, transient or not, will choose to inform the City of the specifics of their living arrangements. Nevertheless, this Court need not make a determination as to the constitutionality of Plan A, for it will hold that Plan B, utilizing voter registration lists, is a constitutionally permissible basis for reapportionment.

The Court's discussion of Plan B will be somewhat more involved, for the Court above has provided the City with no guidance on the critical issue of the constitutionality of voter registration lists as an apportionment base.

It is important to establish initially that in Maryland, a student who is merely present on a college campus for the purpose of pursuing a course of study does not indicate an intention to abandon his former residence or to acquire a new residence, absent or otherwise. *Shaeffer v. Gilbert*, 73 Md. 66, 20 A. 434 (1980); *Bainum v. Kalen*, 272 Md. 440, 325 A.2d 392 (1974). Thus, on-campus students are presumed by Maryland law not to be residents of the College Park community, but are in fact, considered to be transients or temporary residents.

Moreover, this Court is unable to locate any decision of either the Court of Appeals or the Supreme Court which requires a state to count the entire population as the only acceptable base for apportionment. Indeed, the Supreme Court has recognized a state's legitimate interest in not counting transients and short term residents. A lengthy quotation from *Burns v. Richardson, supra*, serves to illustrate the point:

> We start with the proposition that the Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured. Although total population figures were in fact the bases of comparison in that case and most of the others decided over discussion carefully left open the question what population was being referred to...Neither in *Reynolds v. Sims* nor in any other decision has this court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime, in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured. The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere. 384 U.S. at 91, 16 L. Ed. 2d 490

Although the 14th Amendment does not require apportionment to be based on total population, it does require that one man's vote be worth the same as another's. *Wesberry v. Sanders*, 376

U.S. 1, 11 L. Ed. 2d 481, 84 S. Ct. 526; *Reynolds v. Sims*, 377 U.S. 533, 12 L. Ed. 2d 506, 84 S. Ct. 1362. Indeed, the Court in *Reynolds* ruled that the "overriding objective must be substantial equality of population among the various districts, so that the *vote of any citizen is approximately equal in weight to that of any other citizen in the State.*" 377 U.S. at 579, 12 L. Ed. 2d at 537 (emphasis added).

The Court left as an open question which consideration was more important, equal units of population, or equal weight of each vote. That ambiguity has never been satisfactorily resolved. In *Burns v. Richardson, supra*, the Court held voter registration to be a permissible basis for apportionment, apparently because of a lower court finding that a result based on census figures would not be substantially different. Yet later in *Gaffney v. Cummings*, 412 U.S. 735, 93 S. Ct. 2321, 37 L. Ed. 2d 298 (1973), the Court expressed disfavor with the census as a base for apportionment. Noting that the weight of a person's vote is the important factor, the Court stated that the census

> ...is more of an event than a process. It measures population at only a single instant in time. The proportion of the census population too young to vote or disqualified by alienage or nonresidence varies substantially...And these figures tell us nothing of the other ineligibles making up the substantially equal census populations among election districts: aliens, non-resident military personnel, non-resident students, for example.

The facts in the case at bar provide an excellent example of the above principle. Should the apportionment base be comprised of the total population as the Plaintiffs wish, the votes of those residents of districts without a large percentage of non-resident students would be considerably diluted. As this Court noted in its previous opinion, the result would be that those districts containing the University itself would thus elect half of the council with less than 27% of all registered voters. Such a ludicrous result was contemplated neither by *Reynolds v. Sims, supra*, nor by the Equal Protection Clause.

It was the reasoning of the Supreme Court in *Gaffney* that was adopted by the U.S. District Court in Connecticut to approve voter registration lists as a Constitutionally permissible basis for

apportionment in *Martin v. Venables*, 401 F. Supp. 611 (1975). In so holding that court stated that the Fourteenth Amendment does not require that each representative represent approximately the same number of people, without regard to whether those people have voted, have registered, or are even eligible to register; it requires only that no person have the weight of his vote diminished by permitting the votes of others in another district to acquire added weight. The Court added that practical considerations such as more current data and ease of drawing district lines further contributed to the advantage of voter census data.

Similar reasoning was employed by the U.S. District Court in Alabama in the case of *Reynolds v. Gallian* ex rel. *Attorney General of Alabama*, 380 F. Supp. 803 (M.D. Ala 1969), where voter registration lists were also approved to form an apportionment base.

Plan B as submitted by the City of College Park adheres to the constitutional standard of equal weight for equal votes, while at the same time effectuates the City's legitimate interest in excluding transients. Voter registration as a means of apportionment is free from arbitrariness and discrimination, and would have the uniform application called for by the Court of Appeals. This Court is aware of how well voter registration lists have performed as a basis for selecting jurors; it is confident that these lists will be equally effective in providing a fair and complete apportionment base.

Accordingly, it is this 24th day of April, 1981, ORDERED that Reapportionment Plan B as adopted by the City Council of College Park be, and the same is hereby RATIFIED. The implementation of this plan, however, will be stayed pending appeal.

/S/

*Judge*

Copies mailed by the Court to:
MORRIS TOPF, *Esquire*
KENNETH A. LECHTER, *Esquire*
BY /S/

*Secretary* Date

# In the Circuit Court for Prince George's County, Maryland

LAW NO. 61,664

RENEE DUBOIS, *et al*, *PLAINTIFFS*

*v.*

CITY OF COLLEGE PARK, *et al*, *DEFENDANTS*

## TRANSMITTAL OF AMENDED REAPPORTIONMENT PLAN

Comes now the City of College Park, by its attorney, Morris Topf, and transmits to this Honorable Court its amended reapportionment plan, attached hereto, which provides for a census to be taken by mail.

WHEREFORE, the Defendant prays that this Honorable Court:

1. Approve either plan A or plan B, along with such declarative relief as may be necessary.

2. Schedule this matter to be heard in open court.

And for such further and other relief as this Court may seem fair and just. /S/ MORRIS TOPF

MORRIS TOPF,
*Attorney for Defendant*
6505 Belcrest Road, Suite 8
Hyattsville, Maryland 20782
(301) 277-1111

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of January, 1981, a copy of the aforegoing Transmittal of Amended Reapportionment Plan was mailed, postage prepaid, to Kenneth A. Lechter, Esq., 4415 Old Branch Avenue, Marlow Heights, Maryland 20031, Attorney for Plaintiffs. /S/ MORRIS TOPF

MORRIS TOPF

DRAFT 4

# RESOLUTION

WHEREAS, the Honorable Judge Eldridge of the Maryland Court of Appeals found the apportionment plan submitted by the City of College Park, in Law #61664 invalid because it treated students living in the dormitory facilities on campus different from the manner in which students living elsewhere in the City were treated, and

WHEREAS, to eliminate this invalidity simply by excluding off-campus non-resident students would still leave the City vulnerable to attack for not treating off-campus non-resident students the same as off-campus non-resident non-students, and

WHEREAS, the City wishes to submit an apportionment plan to the Court for approval which is consistent with Constitutional guidelines, including the requirement of the City to exclude from the apportionment base those persons Supreme Court decisions have told us may be excluded as being "ineligibles," that is, non-residents, and

WHEREAS, by prior resolution of this Council the City Attorney was authorized to submit alternative re-apportionment plans A and B, and

WHEREAS, it has now come to the attention of the Council that the estimated cost of implementing Plan A in its present form is $50,000.00,

NOW, THEREFORE, BE IT RESOLVED by the Mayor and Council that the City Attorney is hereby authorized to submit the following revised Plan A and Plan B to the Court:

The City of College Park proposes two alternative apportionment plans, to be designated Plan A and Plan B. Plan A is an apportionment plan based upon a population census conducted by the City of College Park, by mail. In conducting the census, the City will send a census form to each postal address in the City, including group housing, apartments, dormitories, fraternities and sororities. The census form shall be essentially as shown attached hereto. The purpose of the census is to make sure that only those

persons who are bona fide residents of the City of College Park are counted in the apportionment base. The word "residence" for these purposes means the affiant's primary residence, where he presently resides and plans to reside, except for short, temporary absences as, for example, a vacation or hospitalization. The questionnaire to be used will require signature under oath subject to penalty of five hundred dollar fine and/or 90 day imprisonment, in accordance with Section 3 of Article 23A of the Annotated Code of Maryland, that is, refusal to answer the census taker's questions or an untruthful answer, shall subject the person to the fine and penalty mentioned in Section 3 of Article 23A of the Annotated Code of Maryland.

A negative answer, or failure to answer, to questions 5, 6, 7 or 8 will render that person a non-resident. Children shall be included as residents if the parent or guardian with whom they reside is considered a resident.

Once this census is completed, the Council will then divide the City into eight mathematically equal Councilmanic districts, making use of the gathered census data (excluding the non-residents).

The foregoing procedure, under apportionment Plan A, may be subject to possible constitutional attack on the City's authority to conduct such a census imposing the proposed penalties for failure to truthfully answer the form or violation of the confidentiality of information on it. For this reason should the Court declare that the City is without authority to conduct the prescribed census with its criminal sanctions, the City proposes the alternative below Plan B, as below:

Plan B is a plan based upon a rigorous, active program of solicitation on the part of the City of potential registered voters. A mailing will be sent to each housing unit in the City, advising persons of the program. The City will deputize a number of registrants to take registration using the same questionnaire as in Plan A so as to insure that persons registering are bona fide residents of the City of College Park. In other words, the same registration form as the City has been using for the past number of years will be used. Based upon the active program of solicitation of registration,

within approximately three months after completion of registration, the City shall then apportion the City into eight equal councilmanic districts based upon the registered voters. The City will reapportion itself every five years, in the event that there is a variance of 5% or more in registered voters between any district and the mathematical average of all districts. The ninety day residency requirement of Section 14 of the Charter will remain in effect.

In line with either of the plans above, the College Park Charter will be amended and all portions of the present charter inconsistent with the changes will be rescinded. Any resident of the City may challenge the determination of residency of any person under Plan A or Plan B, and the City shall promulgate reasonable rules and regulations for such challenge.

The foregoing changes are subject to ratification by the Court.

PLAN A

## COLLEGE PARK CENSUS FORM

You are hereby advised that the following questions require your answer under oath. Refusal to complete the below requested information or an untruthful answer, will subject the person to a maximum fine of $500 and/or ninety (90) days imprisonment pursuant to the provisions of Article 23a, Section 3 of the Annotated Code of Maryland:

1. Name:

2. Age:

3. Address: _____

_____ Apt. or Room # _____

4. List the name, age and family relationship to you of each person related to you by blood or marriage living at your above address. Kindly note that this information is confidential and wrongful disclosure of such information will subject the violator to the same fine and imprisonment as noted above. If there is any person living at this address not related to you by blood or marriage, see note #1 below in order to secure additional census forms.

| | *Name* | *Age* | *Blood or Marital Relationship* |
|---|---|---|---|
| a. | | | |
| b. | | | |
| c. | | | |
| d. | | | |
| e. | | | |
| f. | | | |

5. Is College Park your primary residence, that is, where you presently reside and plan to reside, except for short, temporary absences (as, for example, a vacation of hospitalization)?

☐ YES ☐ NO

6. If you are presently registered to vote in a state other than Maryland, county other than Prince George's or any municipality

other than College Park, will you promptly take steps to cancel such registration?

☐ YES ☐ NO

7. If you are required to file a state income tax return, will you list College Park as your residence?

☐ YES ☐ NO

8. If you register to vote in the City of College Park, it will thenceforth be presumed that College Park is your residence for voting purposes and you may have to overcome that presumption should you later attempt to register in a state, county or municipality other than Maryland, Prince George's County, or the City of College Park, respectively, and do you accept this fact?

☐ YES ☐ NO

_____ _____

Date Name

NOTE #1: If there are one or more persons living with you at your above address unrelated to you by blood or marriage, kindly indicate the number at the end of this note so that the City may send additional forms. NUMBER _____